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# RECOGNITIONAL AND ORGANIZATIONAL PICKETING UNDER AMENDMENTS TO THE TAFT-HARTLEY ACT

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"The Labor-Management Reporting and Disclosure Act of 1959 . . . goes beyond the Taft-Hartley Act to legislate a comprehensive code governing organizational strikes and picketing and draws no distinction between 'organizational' and 'recognitional' picketing. While proscribing peaceful organizational strikes in many situations, it also establishes safeguards against the [Labor] Board's interference with legitimate picketing activity."[1] Thus did the Supreme Court in its recent *Curtis* decision summarize the purpose and the scope of the amendment to the Taft-Hartley Act which is known as Section 8(b)(7). Our task is to develop and expand the Supreme Court's summary in the light of the statutory language, the legislative history, and the judicial authority so far available. In doing so we should be mindful that Section 8(b)(7), although a major step in an evolving pattern of regulation of union conduct, is nonetheless only one of many interwoven sections in a complex social statute. We should also remember that in enacting labor legislation the ultimate purpose of the Congress is to fashion a coherent national labor policy and not merely to strike at particular abuses.

The language of Section 8(b)(7) makes it an unfair labor practice for a labor organization or its agents "to picket or cause to be picketed or threaten to picket or cause to be picketed any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collec-

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[1] NLRB v. Teamsters, Local 639, 80 S. Ct. 706, 716, 39 L.C. 69,815, 69,822 (1960).

tive bargaining representative, unless such labor organization is currently certified as the representative of such employees", and unless certain specified conditions, discussed hereafter, are met. The choice of language by the Congress is significant.

The use of the terms "to picket or cause to be picketed, or threaten to picket or cause to be picketed" appear to make Section 8(b)(7) applicable only to picketing and not to strike activity as such or to other forms of union activity. Thus, a strike for recognition unaccompanied by picketing would not be encompassed by the Section. Nor would the Section reach a situation where a union uses consumer boycott techniques short of picketing, as for example, oral or written appeals for the purpose of forcing recognition. While the Supreme Court did use the phrase "organizational strikes" in the summary of Section 8(b)(7) that I quoted at the outset, I am inclined to believe that the Court had in mind strikes accompanied by picketing, which was the situation in the *Curtis* case.

The use of the term "an employer" in Section 8(b)(7) extends the Section to both primary and secondary picketing, although the Section is principally designed to reach primary picketing. Of course, the need for Section 8(b)(7) in secondary situations is somewhat academic, since secondary picketing is now adequately covered by the amended Section 8(b)(4) of the Taft-Hartley Act. The use of the term "an object" makes Section 8(b)(7) applicable to any situation where the picketing has an illegal objective, regardless of whether the picketing may also have other legitimate objectives.

The phrase "forcing or requiring an employer to recognize or bargain with a labor organization" proscribes recognitional picketing. The language used is sufficiently broad to encompass not only picketing for exclusive recognition, but also for a lesser form of recognition such as a member's-only contract. The language is also broad enough to reach picketing for recognition by a majority union, provided it is not certified, as well as picketing by a minority union. Thus, in the *Charlton Press* case,[2] involving an injunction proceeding against the I.T.U., the Court expressly rejected the contention that majority status is itself a defense to a violation of Section 8(b)(7).

The phrase "forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative" proscribes organizational picketing. Does

[2] Green v. Typographical Union and Local 285 (Charlton Press, Inc.), —F. Supp. —, 39 L.C. 68,940, 68,944 (Conn. 1960). McLeod v. Teamsters, Local 239, 179 F. Supp. 481, 39 L.C. 69,153, 69,158 (E.D. N.Y. 1960).

Section 8(b)(7) proscribe all forms of organizational picketing—both the coercive kind and the informational kind, or only the former? The same question is to be asked of recognitional picketing. That Section 8(b)(7) reaches coercive organizational or recognitional picketing is clear. The instance of picketing most frequently given in the legislative history is where a "stranger" or minority union seeks by the sheer pressure of a picket line to compel the employer to grant recognition or the employees to join the union, irrespective of his or their wishes.

But suppose that the union in good faith seeks by its picketing not to "strongarm" but merely to persuade the employer to grant recognition or the employees to join. Can this picketing be regarded as for an object of "forcing or requiring" the employer to grant recognition or "forcing or requiring" the employees to join? The answer appears to be yes in both cases, with the possible exception of the situation covered by the second proviso to Section 8(b)(7)(C) which will be discussed later.

The reasoning for this conclusion is as follows: Picketing, irrespective of the union's motive, exerts pressure on both employer and employees alike, because it tends to invite action which disrupts or curtails the employer's operations and thereby jeopardizes the employer's business and the employees' livelihood. Picketing also exerts pressure particularly on employees because it compels them to choose between honoring or ignoring the picket line, a decision which may or may not have inconvenient, if not unpleasant, consequences. Hence, the foreseeable and necessary effect of any organizational or recognitional picketing is restraint and coercion.

This being so, it must follow that the ultimate objective, rather than the immediate purpose, of the picketing is the touchstone of Section 8(b)(7). The determinative question then is, what does the union seek to obtain in the end by picketing, and not what part of the employer or employees does the union seek to influence—their intellects or their fears. Otherwise Section 8(b)(7) would become a legislative nullity. The Section was enacted, as the Court pointed out in the *Charlton Press* case, "to provide for the orderly resolution of disputes over representation of employees by requiring that such questions be settled by a proper tribunal, rather than through coercive activities by the antagonists".[3] But this purpose of Congress would be achieved in relatively few cases if, in order to establish a violation of Section 8(b)(7), independent proof had to be adduced that the union meant the picketing to have its natural effect of coercing the employer or employees. In sum, the Con-

[3] Greene v. Typographical Union and Local 285, *supra*, note 2, at 68,944.

gressional intent to free employers and employees of the pressure of organizational or recognitional picket lines requires that picketing be deemed to be for an object prohibited by Section 8(b)(7), if the union seeks either to persuade or to compel the employer to recognize it or the employees to join it.

However, even though picketing is for an object forbidden by Section 8(b)(7), it does not violate the Section if the union is currently certified as the representative of the employees. Does this exception encompass the situation where the picketing union is not certified, but has a contract with the employer which would bar an election? The answer appears to be yes for the following reason: The Labor Board and the Courts hold that during the term of a contract which is a bar the employer must, absent unusual circumstances, continue to recognize and to bargain with the incumbent union although it is not certified. If the employer should refuse to do so, and the union pickets, the Board would be disposed to view the picketing as solely for the object of protesting the employer's unfair labor practice. To the extent that the union may be said to be seeking recognition, such would not be a true and independent object of the picketing, inasmuch as no question concerning representation would exist and the union would be entitled to recognition as a matter of law.

Another question is: Does certification by a state agency immunize picketing under Section 8(b)(7)? I believe that the answer is yes, if the Labor Board would otherwise recognize the certification. Section 8(b)(7) uses the term "currently certified", whereas Section 8(b)(4)(B) and Section 8(b)(4)(C), which also regulate recognitional picketing, speak of "certified under the provisions of Section 9" of the Taft-Hartley Act, and thereby restrict their applicability to certification by the Labor Board. It would seem that if Congress intended a similar restriction upon Section 8(b)-(7), it would have used similar or equivalent language. Moreover, the Labor Board holds that where a union is certified by a state agency, such certification will be accorded the same status as a certification by the Board with respect to the employer's duty to bargain and to the applicability of the one-year certification rule, the one-year election rule, and the Board's contract-bar rules. The same view must be taken where Section 8(b)(7) is involved, or the status accorded a state certification would be vitiated. Such was the holding of the Court in the recent *Fowler Hotel Case*.[4]

But suppose that a union has neither a certification nor a contract, and that the employer unlawfully refuses to recognize it. To

[4] Getreu v. Bartenders & Hotel & Restaurant Employees, Local 58 (Fowler Hotel, Inc.), 181 F. Supp. 738, 39 L.C. 69,038, (N.D. Ind. 1960).

illustrate: A union requests recognition on the basis of a card check which clearly establishes majority status. The employer refuses in the context of unfair labor practices designed to dissipate the union's majority and prevent a free election. The union begins to picket for recognition and, meanwhile, files a Section 8(a)(5) charge against the employer. The latter counters by filing a Section 8(b)(7) charge against the union. Assuming that the 8(b)(7) charge has merit, will the Labor Board process the charge and seek to enjoin the picketing?

The answer appears to be no. It is my understanding that the Board will defer action on the 8(b)(7) charge pending investigation of the 8(a)(5) charge. If the latter has merit and a complaint issues alleging an unlawful refusal to bargain, the 8(b)(7) charge will be dismissed as will be any petition filed by the employer or another union. Meanwhile, the picketing may continue pending the outcome of the 8(a)(5) proceeding.

Although it is difficult to square the Board's position with the wording and legislative history of Section 10 (1), discussed hereafter, which indicates that the only employer unfair labor practice available as a defense to an 8(b)(7) charge is a violation of Section 8(a)(2), the Board's position appears to be sound and sensible. The "bases" of an unlawful-refusal-to-bargain proceeding under Section 8(a)(5) and an unlawful-recognitional-picketing proceeding under Section 8(b)(7) are mutually inconsistent, since the latter presupposes that the union is not lawfully entitled to recognition or at least that the employer may lawfully withhold recognition pending the Labor Board's resolution of the representation question in issue. Moreover, if the Board were to apply Section 8(b)(7) to the given situation, its action would be a futile gesture. The 8(a)(5) charge, if meritorious, would block the holding of an election and would cause the dismissal of a petition filed by the picketing union to meet the requirements of Section 8(b)(7)(C) discussed hereafter.

And this brings us to the conditions set forth in sub-paragraphs (A), (B) and (C) of Section 8(b)(7). Sub-paragraph (A) proscribes picketing for the forbidden objectives "where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under Section 9(c) of this Act". As explained by Secretary of Labor Mitchell, in his statement to the Senate Labor Committee, Section 8(b)(7)(A) would not bar picketing:

> . . . if the incumbent union (a) was a minority union (a union not designated as bargaining representative by an

> uncoerced majority of the employees), (b) was dominated or assisted by the employer, (c) had established its majority status by fraudulent means, (d) had an existing contract which contained an illegal union security provision, (e) had an existing contract which had been in effect for more than two years, or (f) had suffered a schism because of its parent organization's expulsion from the AFL-CIO on grounds of corruption or Communist domination.[5]

In short, a union may picket for recognitional or organizational purposes, although the employer has recognized another union, if the other union is a minority union or a Section 8(a)(2) union or if its contract would not bar the holding of an election. The length of the picketing, however, would be limited by the conditions specified in sub-paragraph (C) of Section 8(b)(7) described hereafter. Moreover, if the union being recognized has been certified by the Labor Board, the picketing would violate Section 8(b)(4)-(C) even though the aforementioned defenses would be available under Section 8(b)(7)(A). The Labor Board interprets Section 8(b)(4)(C) as protecting an outstanding certification against collateral attack through picketing, and nothing in the language or legislative history of Section 8(b)(7) indicates that Congress intended to reverse or to amend the Board's interpretation.

Sub-paragraph (b) of Section 8(b)(7) proscribes recognitional or organizational picketing "where within the preceding twelve months a valid election under Section 9(c) of this Act has been conducted". As explained by Secretary of Labor Mitchell, Section 8(b)(7)(B):

> . . . would be operative for the most part when the election had resulted in the certification of no union. If the election had resulted in the certification of another union, picketing for recognition would presently be barred under Section 8-(b)(4)(C). If the picketing resulted in the certification of the picketing union, picketing by the union would be permissible as being directed against the employer's unfair labor practice of refusal to recognize and bargain with it.[6]

Thus, a union which loses a valid election cannot picket for recognitional or organizational purposes within twelve months after conducting the election. If objections to the election are filed, the union can continue to picket until the objections are ruled on, but if they are overruled, the twelve-month period runs, as in the case of the one-year election rule under Section 9(c)(3), from the date of the election and not from the date of decision on the objections.[7]

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[5] Hearings before the Subcommittee on Labor, U.S. Senate, on S.505, *et al.*, 86th Congress, 1st Sess., p. 409.

[6] *Ibid.*

[7] See Senate Hearings, *Id.* at 241. See also Macatee, Inc., 127 NLRB No. 93. There the Labor Board rejected the Trial Examiner's recommended order

Suppose the union loses the election and thereafter, but before the expiration of the twelve-month period, acquires majority support. Can it then picket for recognition? The answer would appear to be no. Senator Cooper proposed an amendment which would have explicitly permitted this result, and it passed the Senate. But the version which passed the House contained no such qualification and the House version was adopted by the Congress.[8] Suppose, further, that a union which was not on the ballot in the election had at the time, or thereafter acquired, majority support. May it picket for recognition during the twelve-month period? The answer is no, because any valid election within twelve months bars picketing by any union.[9]

Sub-paragraph (C) of Section 8(b)(7), subject to two provisos discussed hereafter, proscribes recognitional or organizational picketing "where such picketing has been conducted without a petition being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing". Thus, if the picketing is not otherwise proscribed by Section 8(b)(7)(A) or by Section 8(b)(7)(B), a union may picket for recognitional or organizational objectives for a reasonable period of time not to exceed thirty days. If no petition is filed within that time, the picketing must stop. If, however, a timely petition is filed, the picketing may continue until an election has been held and the results are certified. Once that occurs, the picketing then becomes subject to the limitations of Section 8(b)(7)(B) and also of Section 8(b)(4)-(C) in the event that another union has been certified. The petition called for by Section 8(b)(7)(C) may be filed by the union, or by the employer, or by one or more employees, or by a third party.

What constitutes a reasonable period of time? Or, to state the question in the negative, what is an unreasonable delay in filing a petition? The answer depends on the nature of the employer's operations, on the circumstances of the picketing, and on the consequences of the picketing. Where the picketing was characterized by violence, one Court has held that ten days is an unreasonable delay.[10] In another case involving a daily newspaper the Court ruled that fifteen days was an unreasonable delay.[11] In still another

which would have required the respondent union to cease and desist from recognitional picketing under Secton 8(b)(7)(B) so long as the Board's Certification of Results remained in force and effect. The Board limited the cease and desist order to a period of one year following the date of the election.

[8] §105 Cong. Rec., 5963-5965, (daily ed. April 24, 1959). §708(a)(7)(B) of S.1555, as passed by the Senate.

[9] §105 Cong. Rec. A7915; *Id.* at 421 (Question 36).

[10] Cuneo v. United Shoe Workers of America, AFL-CIO, 181 F. Supp. 324, 39 L.C. 69,579 (N.J. 1960).

[11] Elliott v. Sapula Typographical Union No. 619, ITU, — F. Supp. —, 38 L.C. 66,020 (N.D. Okla. 1959).

case where the employer sold and distributed automotive parts and accessories and where the picketing did not stop deliveries, the Court indicated that twenty-seven days was a reasonable period within which to file a petition.[12] On the other hand, where the picketing interferred with deliveries, the Courts have deemed it to be a factor shortening the period within which a petition must be filed.[13]

Suppose that a petition is not filed at all or that it is not filed within a reasonable period of time. What happens? Nothing insofar as Section 8(b)(7) is concerned, unless a charge alleging a violation of Section 8(b)(7)(C) is filed. Absent such a charge, a petition, if filed, will be processed under Section 9(c) like any other representation petition. The Labor Board holds that the filing of a charge is pre-requisite to an expedited election under Section 8(b)-(7)(C).[14] This position, although open to question, seems to reflect the intent of the Congress and is likely to receive the ultimate approval of the Courts.

But assume that such a charge has been filed. Then what happens? If upon investigation the Labor Board's Regional Director finds that the charge is without merit, in that the picketing is not for recognitional or informational objectives, he will dismiss the charge regardless of whether or not a timely petition has been filed.[15] A petition, if filed, will be processed under the regular provisions of Section 9(c),[16] and the picketing may continue unless it causes a stoppage of deliveries. If it does, the picketing then becomes unlawful.

If, on the other hand, the Regional Director finds that the charge is meritorious and further finds that a petition has not been filed within a reasonable period of time, he will institute unfair labor practice proceedings and will process the petition under the regular provisions of Section 9(c). Meanwhile, he will seek an injunction pursuant to Section 10(1) of the Taft-Hartley Act. This Section authorizes injunction proceedings in Section 8(b)(7) cases, whether sub-paragraph (A), or (B), or (C) is involved, except where "a charge against the employer under Section 8(a)(2) has been filed and after the preliminary investigation [the Regional Director] has reasonable cause to believe that such charge is true and that a complaint should issue". In the latter event the Regional

[12] McLeod v. Local 239, IBT, *supra,* note 2.
[13] Cuneo v. United Shoe Workers of America, AFL-CIO, *supra,* note 10, and Elliott v. Sapula Typographical Union No. 619, ITU, *supra,* note 11.
[14] §102.73 *et seq.,* Rules and Regulations of the National Labor Relations Board, as amended November 4, 1959.
[15] *Id.,* §102.74.
[16] *Ibid.*

Director may continue with the unfair labor practice proceedings, but he may not seek an injunction to stop the picketing.

Nor may the Regional Director seek an injunction where a petition has been filed within a reasonable period of time, although he finds that the Section 8(b)(7)(C) charge otherwise has merit. Instead, the Regional Director suspends further proceedings on the charge and processes the petition in accordance with the first proviso to Section 8(b)(7)(C).[17] This provides that, upon the filing of a representation petition as called for by Section 8(b)(7)(C), "the Board shall forthwith, without regard to the provisions of Section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof". In sum, where a timely petition is filed in the face of organizational or recognitional picketing, the Board must hold a prompt election without regard to whether the picketing union makes a 30 per cent showing of interest or claims to represent the employees in question. The Board must, however, determine the appropriate unit and, absent an agreement of the parties, fix eligibility requirements.

May the Labor Board hold the election in advance of a hearing? The Board believes that it may[18] and has so provided in its Rules and Regulations. These Rules and Regulations authorize the Regional Director, after he has completed his investigation, either to set the petition down for hearing or to direct an immediate election.[19] In the latter event any party aggrieved may file with the Board for special permission to appeal from the Regional Director's determination.[20] If the petition is set down for hearing, the parties are not allowed to file briefs without the special permission of the Board, and instead they may state their respective legal positions upon the record at the close of the hearing.[21] The Board has further expedited the election procedure under Section 8(b)(7)(C) by providing that the Regional Director's rulings on any objections or challenged ballots shall be final unless the Board grants special permission to appeal.[22] Finally, where an election has been directed, the Regional Director dismisses the 8(b)(7)(C) charge.[23]

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[17] *Id.*, §102.75.
[18] See Dept. & Specialty Store Employees Union, Local 1265 v. Brown, — F. Supp. —, 40 L.C. 70,053 (N.D. Calif. 1960), where the Court refused to enjoin the Labor Board from conducting a pre-hearing election under Section 8(b)(7)(C).
[19] *Supra* note 14, §102.77(b).
[20] *Id.*, §102.80(c).
[21] *Id.*, §102.77(c).
[22] *Id.*, §102.78.
[23] *Id.*, §102.81(a).

Suppose charges are filed alleging that the employer involved has discriminatorily discharged certain union supporters or has committed other unfair labor practices. The Regional Director investigates the charges and finds them meritorious. Will he proceed with an election? The answer is no because the Labor Board will not proceed with an election in the face of meritorious charges, on the ground that the employer's conduct, if unlawful, would deny the employees freedom of choice in the election. In such a situation the picketing may continue until the unfair labor practices have been remedied or otherwise disposed of, and a free election can be held. This delay, which may run from several months to a year or more, does tend to defeat the Congressional purpose of having elections under Section 8(b)(7)(C) held as quickly as possible, but it would be pointless for the Board to proceed with an election which would subsequently have to be set aside because of the employer's unfair labor practices. The problem, however, can and should be narrowed by the Board taking a more realistic view as to what conduct by an employer will prevent a free election. At the present time the Board considers any unfair labor practice, no matter how trivial in nature or impact, a bar to an election. This view accords with the Board's position that laboratory conditions should prevail in representation elections, but it scarcely reflects the realities of industrial life.

And this brings us to the second proviso to Section 8(b)(7)(C). This proviso states that "nothing in this sub-paragraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver, or transport any goods or not to perform any services". In short, picketing which truthfully advises the public that a particular employer is non-union may continue beyond a reasonable period of time, even beyond thirty days, although no representation petition has been filed, as long as it does not cause the employees of other employers to refuse to cross the picket line. And this is true although the picketing causes the public not to buy the employer's products or causes his own employees not to go to work.

The proviso presents three principal questions for ultimate resolution by the Labor Board and the Courts:

First, suppose that the picketing union intends to make only an informational appeal and not to stop deliveries and takes every step possible to avoid such a stoppage. Nevertheless, one or more

employees of other employers refuse to cross the picket line. Does this result deprive the picketing of its immunity? I believe that the answer is yes, except in the situation where the picketed employer, or persons acting on his behalf, connive with employees of other employers not to cross the picket line. Otherwise, one would have to interpret the term "effect" in the second proviso as "intended effect", and for such interpretation there does not appear to be any warrant either in the language or the history of the proviso.

Second, suppose that the picket signs truthfully state that the employer is non-union but add some argumentative remarks and some misstatements or fabrications. Or suppose that the picket signs state that the employer does not have a contract with or employ members of a labor organization, but whether he does is a matter of dispute. Does the publicity in either instance lose its immunity? I believe that the answer depends on the particular facts and the specific circumstances of each case.

It seems obvious that Congress, aware as it must have been of the realities of industrial life and the high protection given by the Constitution to freedom of speech, did not intend to hold picketing unions to absolute truth, nor to restrict their picket signs to the precise words of the proviso, namely, that the employer "does not employ members of, or have a contract with, a labor organization". Not even the law of libel and slander or the law of perjury exact so high or so unrealistic a standard. It seems more likely that Congress intended, and that eventually the Labor Board and the Courts will adopt, a standard somewhat as follows:

A picket sign will not be considered untruthful if: (1) the words used may be fairly construed to mean that the employer does not have a contract with or employ members of a labor organization; (2) the question of whether he does, entails not questions of fact, but matters of opinion or legal conclusion; (3) misstatements or fabrications relate only to incidental and not to material facts; (4) misrepresentation of material facts is attributable to action on the part of the employer and not to the fault of the union; and (5) argumentative remarks do not tend to mislead the public or other employees as to the truth of material facts.

The third principal question presented by the second proviso to Section 8(b)(7)(C) is as follows: Suppose that the picketing is informational within the meaning of the proviso, but that, in addition, it has a recognitional or organizational object. Does the picketing become unlawful if it continues beyond a reasonable period of time without a petition being filed? In the *Fowler Hotel* case Judge Swygert

answered the question in the negative. Judge Swygert reasoned as follows:

> . . . it is [the Labor Board's] position that the proviso has no application where "an object" of the picketing is recognition or bargaining and is carried on under circumstances proscribed by Section 8(b)(7). I do not so interpret the statute. I think sub-paragraph (C) means that although "an object" of picketing may be bargaining, as it admittedly is in this case, it is immunized from the statute if "the purpose" of such picketing is also truthfully to inform the public that the employer does not have a contract with the union and further if the picketing does not curtail picking up, delivery or transportation of goods or the performance of services. It is difficult, if not impossible, to imagine any kind of informational picketing pertaining to an employer's failure or refusal to employ union members or to have a collective bargaining agreement where another object of such picketing would not be ultimate union recognition or bargaining. In most instances certainly the aim of such informational picketing could only be to bring economic pressure upon the employer to recognize and bargain with the labor organization. To adopt [the Labor Board's] interpretation of sub-paragraph (C) would make the second proviso entirely meaningless.[24]

However, Judge Bartels in the *Stan-Jay* case answered the question in the affirmative. Judge Bartels reasoned as follows:

> . . . Taken as a whole, the record presents a substantial basis of believable evidence that the picketing after November 13th has for an objective the "forcing and requiring" of Stan-Jay to recognize and bargain with the respondent. It is true that this picketing may also be informational or advisory in character and, as such, is permissible by the 1959 Act. However, this is irrelevant if such picketing also has as one of its objectives an unfair labor practice. . . . Neither the proviso in Section 8(b)(7)(C), the First Amendment to the Constitution, nor the authorities cited justify non-coercive speech or picketing in furtherance of an unlawful objective as described in the Act as amended. Congress did not intend by the general language in the proviso in Section 8(b)(7)(C) to sanction that which it so expressly outlawed in the specific language immediately preceding the proviso.[25]

Which answer will ultimately prevail—Judge Swygert's or Judge Bartels'? One hesitates to predict, and understandably so in view of the proviso's legislative history which is more of a weather vane than a compass.

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[24] Getreu v. Bartenders, *supra,* note 4, at pp. 69,037, 69,038.

[25] McLeod v. Teamsters, Local 739, etc., *supra,* note 2, at pp. 69,158-69,159. See also Penello v. Retail Store Employees Union, Local 400, RCIA, AFL-CIO, 39 L.C. 69,302 (1960).

The proviso was inserted during the conference of the Senate and the House on the Landrum-Griffin bill. Shortly before the Conference Agreement was concluded, the Senate Conferees, in a report to the Senate, explained the effect of Section 8(b)(7)(C) including its second proviso as follows:

> The Senate Bill would forbid recognition or organizational picketing under two conditions: (i) When the employer has a contract with another *bona fide* union which is a bar to an election; and (ii) for 9 months after an election. The House bill extended the 9 months to 12 and added a third and fourth prohibition; (iii) to prohibit all organizational picketing unless the union could prove that it had the support of 30 per cent of the employees; and (iv) to prohibit organizational picketing after 30 days unless the union had filed a petition for an election.
>
> The proposal omits point (iii) and accepts point (iv) of the House bill, except that picketing would be permitted to continue without a petition if it appealed only to the employees to join the union or the public not to patronize the non-union establishment without causing truckers or the employees of other employers to refuse to cross the picket line.
>
> On organizational picketing then, we once again accept the House version except for two propositions which are fair and reasonable:
>
> 1. A union may use pickets in an effort to organize until there is an election in which the NLRB can determine the employees' wishes. But a union which is stopping truck deliveries or other employees would not be allowed to avoid an election.
>
> 2. Picketing in the absence of a contract or an election, which has only the effect of notifying the public of non-union conditions and asking the employees to join the union would not be banned.[26]

Similarly, Senator Kennedy, during the debate on the Conference Bill, stated:

> . . . The House bill would have forbidden virtually all organizational picketing, even though the pickets did not stop truck deliveries or exercise other economic coercion. The amendments adopted in conference secure the right to engage in all forms of organizational picketing up to the time of an election in which the employees can freely express their desires with respect to the choice of a bargaining representative. When the picketing results in economic pressure through the refusal of other employees to cross the picket line, the bill would require a prompt election. Purely informational picketing cannot be curtailed under the Conference Report, although even this privilege would have been denied by the Landrum-Griffin measure.[27]

[26] Cong. Rec. 15906-15908 (daily ed. August 28, 1959).
[27] *Id.*, 16,413 (daily ed. September 3, 1959).

The overall meaning of these statements, particularly the emphasis on "organizational" and the silence on "recognitional" picketing, seems to be that the second proviso was intended to give the union an unqualified right under Section 8(b)(7)(C) to engage in "organizational" but not in "recognitional" picketing, so long as no deliveries were stopped and the signs used were not untruthful.[28]

On the other hand, there is also legislative history indicating that the proviso was intended to apply to neither organizational nor recognitional picketing but only to what might be termed "standards" picketing. Thus, opponents of the Administration and the Landrum-Griffin bills, in an effort to show the reach of those bills, pointed out that they would prohibit a union from picketing an employer to advertise to the public the existence of substandard conditions.[29] Moreover, these same persons were aware of the fact that, under the Labor Board's *Lewis Food* decision,[30] picketing for a lawful object can be transmuted into illegal picketing by finding another illegal object.[31]

In these circumstances, it is reasonable to conclude that the second proviso was inserted to make sure that, even though the opening paragraph of Section 8(b)(7) did not appear to reach standards picketing, such picketing would nevertheless not be brought in under a loose application of the "an object" test in the situation where a protest against substandard conditions was most defensible, i.e., where the employer was not recognizing another union and there had not been a Board election within the preceding 12 months.

The inference that the second proviso covers purely an appeal to the public respecting substandard conditions is indicated by other evidence. At times the legislative history speaks not only of organizational picketing, but also of "informational picketing," thereby perhaps indi-

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[28] It is clear, however, that the second proviso does not apply to picketing under Section 8(b)(7)(A) or (B), if the picketing be "organizational" or "recognitional." This conclusion is confirmed not only by the language of the proviso (That nothing in this subparagraph (C) shall be construed etc.) which expressly limits its application to Section 8(b)(7)(C), but also by the statements quoted above and particularly the statement of Representative Griffin that the proviso "pertains to subsection (C) only and therefore consumer appeals for organizational or recognitional purposes are banned after an election." 105 Cong. Rec. A7915 (daily ed. September 10, 1959). But whether purely informational picketing is banned under Section 8(b)(7)(A) or (B) is, of course, another question. In Alton Myers Bros., Inc., 14-CP-1, the General Counsel of the Labor Board appears to have taken the position that such picketing is banned. The Trial Examiner held to the contrary. The case is now pending decision by the Board.

[29] See Cong Rec. 5952-5953 (Sen. Kennedy) (daily ed. April 24, 1959); Hearings before Subcommittee on Labor, U.S. Senate, *supra,* note 5 at 354-355, 362, 413, 422.

[30] Lewis Food Co., 115 NLRB 890.

[31] See Hearings, *supra,* note 5 at 334-335.

cating a category of picketing which is neither for recognitional nor for organizational purposes. Moreover, the comments by Michael Bernstein, Senate Minority Counsel, published in the U.S. News & World Report, and later reprinted in the Congressional Record by Senator Goldwater are as follows respecting the second proviso:

> If the union makes it clear that it doesn't fall under [subsection A or B], the union may then picket indefinitely, provided its signs and its literature and its appeals make it plain that all it is seeking to do is to advise the consuming public that the employer does not employ union workers or that he has not got a collective-bargaining agreement with the union. It may not be for organizational or recognitional purposes.[32]

Additional legislative history can be cited, but, like that already considered, it is ambiguous and ambivalent. Arguments can also be drawn from the statutory language but they are likewise inconclusive since the language lends itself to varying interpretations. It would seem then that as of now any answer is at best an educated guess.

My guess is that the second proviso to Section 8(b)(7)(C) does not permit informational picketing for either organizational or recognitional objectives except where and to the extent that such objectives are the incidental and indirect results of the picketing. In short, to come within the proviso, the picketing must seek directly to inform the public and not to organize the particular employees, or to gain recognition from the particular employer. The latter purposes may be the long-range goals of the union, in that any union activity has for its ultimate purpose the advancement of the labor movement through organizing and recognition, but they may not be the present objectives without forfeiting the protection of the proviso.

There are other questions that can be asked about organizational and recognitional picketing under Section 8(b)(7), and still more questions will arise as the Section is applied to new and novel situations. All these questions must await the elucidating process of litigation, as Justice Frankfurter would say, for final and authoritative answers. Meanwhile, as practitioners in the field of labor law, we can and should aid the process by being industrious and inventive in developing and advocating our own answers. We will thereby fulfill what I deem to be the true role of a lawyer, namely, to mold rather than merely to find the law.

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[32] 105 Cong. Rec. A8357, A8358 (daily ed. September 24, 1959).